UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AGUDAS CHASIDEI CHABAD OF UNITED STATES, *Plaintiff*, v. RUSSIAN FEDERATION; RUSSIAN MINISTRY OF CULTURE AND MASS COMMUNICATION; RUSSIAN STATE LIBRARY; and RUSSIAN STATE MILITARY ARCHIVE, *Defendants.*	Case No. 1:05-cv-01548-RCL

PLAINTIFF'S MOTION FOR AN ORDER TO SHOW CAUSE

Plaintiff Agudas Chasidei Chabad of United States ("Chabad") respectfully submits this Motion for an Order to Show Cause directed to the Government's failure to respond to this Court's October 24, 2017 direction that the Government reassess its position with respect to this litigation, and notify this Court of its updated position in a timely manner. As we explain below, the Government has not followed this Court's direction to reassess its position in this case. The Government has, however, taken a position before the Supreme Court that is *the exact opposite* of the position it takes here.

ARGUMENT

I. The Government Has Not Reported to the Court on a Reassessment of Its Position

In a Statement of Interest (the "Statement") filed on February 3, 2016 (Dkt. 151), the Government opposed Chabad's efforts to enforce the Court's previously-entered judgments in this case, including the Court's judgment on the merits and its judgment assessing monetary sanctions. Not only is the Government's Statement misdirected,[1] it has hindered – and in some instances prevented – even preliminary discovery directed to the identification of assets that might be available to secure compliance with the Court's judgments.

This Court took note of Chabad's predicament at an October 24, 2017 hearing, suggested that "the United States needs to reassess" its position, and directed the Government "to update [its] statement of interest in any event now in light of the action of the unanimous Senate and the

[1] As Chabad has pointed out, the issue before the Court is not whether Chabad can enforce the judgements, it is whether Chabad can take discovery to identify Russian assets that might be available should enforcement be required. Both the Foreign Sovereign Immunities Act and Supreme Court precedent confirm that discovery is appropriate in these circumstances – that is, the identification of Russian assets that might be available for enforcement purposes does not impinge on any protected Russian sovereign interest. Moreover, Chabad has agreed, and the Court has ordered, that Chabad will take no action regarding attachment of Russian property without following procedures specified by the Court's orders in this case and by the statute. *See* Dkt. 152, at 8-9.

Russian ambassador's response." Hearing Tr., October 24, 2017, at 15 (Dkt. 164). Despite the Court's direction – and Chabad's efforts to secure compliance, through direct meetings at the State Department and other means – the Government has remained silent. Indeed, Chabad noted in a July 26, 2018 filing (Dkt. 173-1) that State Department representatives advised Chabad that the Government "[is] not able to state whether the Department would be offering a positon" in response to Chabad's latest papers and it "could not commit to making a decision" regarding a statement in the calendar year 2018. (Dkt. 173-1).[2]

Unfortunately, the Government's failure to comply with the Court's direction has had serious consequences. Several entities have resisted Chabad's subpoenas, citing the Government's Statement. *See, e.g.*, Dkt. 168 at 3-5. Moreover, the Russian Government, which continues to flout this Court's orders, has made clear that in light of the Government's position, it views the Court's judgments as little more than a distraction. Indeed, the Russian Government is hiding behind the U.S. Government's Statement, which effectively shields Russia from any consequences of its ongoing contempt of court. Thus, the Government's Statement has both stymied Chabad's efforts to enforce the judgments and, contrary to the Government's representation to the Court that this matter should be resolved through negotiation, strengthened Russia's position at the bargaining table.

II. The Government Has Abandoned the Position It Advocated in the Statement

Although the Government has not reported to the Court on its current position in this case, in another case *the Government has taken a position that is diametrically opposed to the position it took in the Statement*. On February 21, 2019, the United States submitted a brief in

[2] Chabad confirmed that this position remain unchanged prior to filing this motion.

opposition to a petition for writ of *certiorari* in *In re Grand Jury Subpoena*, Case No. 18-948 (attached as Exhibit A).[3] There the United States argued:

> *The district court's imposition of monetary contempt sanctions in this case was consistent with the FSIA*. The Act confers two kinds of immunity: immunity from jurisdiction, 28 U.S.C. 1604-1607, and immunity from attachment and execution of judgment, 28 U.S.C. 1609-1611. Petitioner argues (Pet. 29-32) that the FSIA would not permit *execution* of a monetary contempt judgment, *i.e.*, enforcement if the contemnor refused to pay. *But petitioner does not explain why, even if that were so, that asserted barrier to executing on an unpaid judgment would categorically prohibit a district court from imposing a contempt sanction in the first place for non-compliance with a grand jury subpoena*.

Br. at 24-25 (emphasis added). This argument makes good sense, and the Government's articulation of its position to the Supreme Court should guide the proceedings in this case as well. That is, the Government should not be permitted to block Chabad's efforts in this case while simultaneously taking the exact opposite position before the Supreme Court.

Particularly in these circumstances, the Government's decision to do nothing in this case is the worst of all possible situations. The Government's silence appears to have no basis in current policy. Even if the Government were to confirm its prior position and oppose Chabad's efforts, then at least Chabad would be able to take additional steps appropriate in those circumstances. But it appears that current Government policy might dictate withdrawal of the Statement of Interest, allowing Chabad to take discovery into Russian assets that might be available to enforce the Court's judgments, consistent with this Court's prior orders. As things now stand, the Government's failure to respond to the Court's direction has created a litigation-purgatory for Chabad.

Chabad understood the Court's direction that the Government reassess and update its position to be a warranted order to break this logjam and grant Chabad the overdue relief it

[3] On March 25, 2019, the Supreme Court denied the petition for *certiorari*, leaving intact the D.C. Circuit's decision upholding the district court's imposition of sanctions.

deserves. The Court directed the Government to do so more than a year ago. The Government has failed to respond to the Court's direction. The fact that the Government has already reassessed its position on these issues, and has stated its new position in a brief filed with the Supreme Court, is sufficient to warrant an order to show cause why the Government should not be required to explain its views to this Court as well.

CONCLUSION

Chabad therefore respectfully requests that the Court Order the Government to show cause, within thirty (30) days as to why it has not proffered any response to the Court's request.

Respectfully submitted,

Dated: March 25, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on March 25, 2019, a true and correct copy of the foregoing PLAINTIFF'S MOTION FOR AN ORDER TO SHOW CAUSE was served by electronic mail on the following counsel of record for the United States:

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I further certify that on March 25, 2019, true and correct copy of the foregoing PLAINTIFF'S MOTION FOR AN ORDER TO SHOW CAUSE was served by First-Class International Mail, through the U.S. Postal Service, on each of the following parties:

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EXHIBIT A

No. 18-948

In the Supreme Court of the United States

IN RE GRAND JURY SUBPOENA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Foreign Sovereign Immunities Act of 1976 (FSIA or Act), 28 U.S.C. 1330, 1602 *et seq.*, confers blanket immunity on foreign-state-owned enterprises from all criminal proceedings, including proceedings to enforce a federal grand jury subpoena, in the United States.

2. Whether the FSIA prohibited the district court from imposing monetary contempt sanctions on a foreign-state-owned enterprise for violation of a court order to comply with a grand jury subpoena.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Statutes and rule:

Statutes and rule—Continued: Page

Statutes and rule—Continued: Page

Miscellaneous:

Miscellaneous—Continued: Page

In the Supreme Court of the United States

No. 18-948

IN RE GRAND JURY SUBPOENA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The public opinion of the court of appeals (Supp. App. 1a-27a) is published at 912 F.3d 623.[1]

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a-6a) was entered on December 18, 2018. On January 22, 2019, this Court granted petitioner's motion for leave to file a petition for a writ of certiorari under seal, and the petition was docketed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] Petitioner has submitted a supplemental brief in support of its petition for a writ of certiorari. This brief cites the appendix to that supplemental brief as "Supp. App." Petitioner has also submitted sealed and unsealed appendices to the petition for a writ of certiorari. This brief cites the unsealed petition appendix as "Pet. App." The court of appeals has issued a sealed version of its opinion and a third version containing *ex parte* information. The petition does not raise issues addressed in the sealed or *ex parte* opinions. If the Court so requests, the government will lodge those opinions with the Clerk.

STATEMENT

A federal grand jury in the District of Columbia issued a subpoena to petitioner, a commercial enterprise doing business in the United States and owned by a foreign government. Petitioner refused to comply and moved to quash the subpoena, arguing in relevant part that, because it is owned by a foreign government, the Foreign Sovereign Immunities Act of 1976 (FSIA or Act), 28 U.S.C. 1330, 1602 *et seq.*, immunizes it from all criminal process. The district court rejected that and petitioner's other challenges, ordered compliance, and held petitioner in civil contempt when it refused to comply. The court of appeals affirmed. Supp. App. 1a-27a; Pet. App. 1a-6a.

1. a. "[F]oreign sovereign immunity is a matter of grace and comity." *Verlinden B. V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 486 (1983). Historically, the grant or denial of immunity was "the case-by-case prerogative of the Executive Branch." *Republic of Iraq* v. *Beaty*, 556 U.S. 848, 857 (2009); see *Samantar* v. *Yousuf*, 560 U.S. 305, 311-313, 320 (2010). That rule flowed from the Executive's constitutional primacy in foreign affairs. See *Republic of Mexico* v. *Hoffman*, 324 U.S. 30, 34-36 (1945).

Until 1952, if a foreign state sought immunity from a private civil action, the Executive generally requested a court to recognize immunity. *Samantar*, 560 U.S. at 311-312. In 1952, the Executive Branch announced a new practice for "granting immunity from suit to foreign governments," under which immunity would attach to "sovereign or public acts," but not "private acts." Letter from Jack B. Tate, Acting Legal Adviser, U.S. Dep't of State, to Philip B. Perlman, Acting Att'y Gen.

(May 19, 1952), *reprinted in Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U.S. 682, 711-715 (1976).

The new policy "proved troublesome." *Verlinden*, 461 U.S. at 487. Foreign nations "often placed diplomatic pressure on the State Department" to urge immunity in private actions, and "political considerations led to suggestions of immunity in cases where immunity would not have been available" under the new policy. *Ibid.* Consequently, "private litigant[s]" faced "considerable uncertainty" about whether their ordinary legal disputes would be blocked as a result. H.R. Rep. No. 1487, 94th Cong., 2d Sess. 9 (1976) (1976 House Report).

b. In 1976, Congress passed the FSIA to address those problems. *Verlinden*, 461 U.S. at 488. Consistent with that purpose, "the Act contains a comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities." *Ibid.* The Act confers immunity from the jurisdiction of federal and state courts, subject to existing treaties, and sets out exceptions to that immunity. 28 U.S.C. 1604-1607. The Act further provides for federal jurisdiction over "any nonjury civil action" against a foreign state as to which it "is not entitled to immunity," 28 U.S.C. 1330(a), and provides for removal of "civil action[s]" from state to federal court, 28 U.S.C. 1441(d). The Act defines venue in "civil action[s]," 28 U.S.C. 1391(f), and sets time limits for "an answer or other responsive pleading to the complaint," 28 U.S.C. 1608(d). The Act also provides for immunity from "attachment arrest and execution" of judgment, 28 U.S.C. 1609, and sets out exceptions to that immunity that partially parallel the exceptions to immunity from suit, 28 U.S.C. 1610-1611.

2. Petitioner is a commercial enterprise owned by a foreign country. Pet. App. 1a.[2] The government served on petitioner at a U.S. office a grand jury subpoena seeking specified records. *Ibid.*; Supp. App. 24a (Williams, J., concurring in part and concurring in the judgment). Petitioner moved to quash the subpoena, arguing in relevant part that it is immune from the jurisdiction of U.S. courts under the FSIA. Pet. App. 2a; Supp. App. 2a.

The district court denied the motion and ordered petitioner to produce the subpoenaed materials. Pet. App. 2a. The court "assumed," without deciding, that the FSIA applies to criminal proceedings, and concluded that, where the FSIA's grant of immunity applies, so does its commercial-activity exception to immunity. *Id.* at 2a, 4a. The court further held that if the commercial-activity exception applies, as the court found that it did on the facts here, jurisdiction over a criminal proceeding could exist under 18 U.S.C. 3231. *Ibid.*

3. Petitioner appealed, and the court of appeals dismissed for lack of appellate jurisdiction. Supp. App. 2a-3a.

4. The district court then held petitioner in contempt and imposed civil contempt sanctions of $50,000 per day, but stayed accrual of those fines pending appeal. Supp. App. 3a.

5. On petitioner's appeal of the contempt order, the court of appeals expedited briefing and argument, and then affirmed. Four days after argument, the court issued a per curiam judgment—with opinion to follow—and ordered that the mandate issue forthwith. Pet.

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[2] As the petition acknowledges (Pet. 1 n.1), petitioner is not itself a foreign government, but is a separate commercial enterprise that a foreign government owns.

App. 1a-6a. Like the district court, the court of appeals "decline[d] to resolve" whether the FSIA applies "in criminal proceedings." *Id.* at 2a. The court instead "assume[d] that immunity extends to the criminal context" and concluded that if one of the FSIA's exceptions to immunity was applicable, the district court had jurisdiction. *Id.* at 2a-4a. The court further concluded, based on the government's *ex parte* showing, that the FSIA's commercial-activity exception applies. *Id.* at 4a-5a. The court additionally held that the FSIA did not prohibit "the monetary [contempt] judgment ordered by the district court." *Id.* at 5a.

6. Petitioner applied to this Court for a stay pending the filing and disposition of a petition for a writ of certiorari. After the Chief Justice entered an administrative stay, Pet. App. 8a, the Chief Justice referred the application to the full Court, which denied the application and vacated the administrative stay. *In re Grand Jury Subpoena*, No. 18A669 (Jan. 8, 2019).

7. On the same day, the court of appeals issued its opinion. Supp. App. 1a-27a. The court noted the government's argument that the FSIA is inapplicable to criminal proceedings, but declined to decide that question. *Id.* at 5a-6a. Instead, assuming the FSIA applies, the court agreed with the district court that the three requirements to sustain the contempt order were satisfied: subject-matter jurisdiction exists; an exception to immunity applies; and contempt sanctions are available. *Id.* at 6a.

The court of appeals held that 18 U.S.C. 3231 provides jurisdiction. Supp. App. 6a-14a. The court rejected petitioner's contention that the FSIA "eliminated all criminal subject-matter jurisdiction over foreign

sovereigns" as inconsistent with "[t]he text of the relevant statutes." *Id.* at 6a. Petitioner's reading, the court noted, would mean that "a foreign-sovereign-owned, purely commercial enterprise operating within the United States could flagrantly violate criminal laws" and "the U.S. government would be powerless to respond, save through diplomatic pressure." *Id.* at 10a. Such a rule would also "signal to even non-sovereign criminals that if they act through such an enterprise, the records might well be immune from criminal subpoenas." *Id.* at 10a-11a. The court expressed great "doubt" that Congress would have "so dramatically gutted the government's crime-fighting toolkit." *Id.* at 11a.[3]

The court of appeals noted petitioner's reliance on statements in *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989), that the FSIA is "the sole basis for obtaining jurisdiction over a foreign state in our courts." Supp. App. 8a. The court explained, however, that "*Amerada Hess* was a civil action" in which plaintiffs "sought to circumvent" the FSIA's immunity framework entirely. *Ibid.* That opinion, the court concluded, "gave no hint" that "in criminal cases clearly covered by an exception to immunity, a district court would nevertheless lack subject-matter jurisdiction." *Id.* at 10a. The court additionally noted petitioner's reliance on *Keller* v. *Central Bank of Nigeria*, 277 F.3d 811 (6th Cir. 2002), but explained that its holding raised "no conflict" with that decision because the Sixth Circuit did not address whether Section 3231

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[3] The court of appeals also rejected a "theory," offered "[a]t oral argument," that Section 3231 "*never* authorized subject-matter jurisdiction" over foreign sovereign defendants. Supp. App. 13a. The court explained that "Section 3231's text" contains no such limitation and that pre-FSIA cases did not support it. *Id.* at 13a-14a.

could apply and, "confronted with the same issue" here "would be free" to find jurisdiction. Supp. App. 13a.

The court of appeals further held that the FSIA's commercial-activity exception applies in this case. Supp. App. 15a-18a. The court observed that Section 1605(a)'s exceptions to immunity are categorically applicable in "any case" and that the commercial-activity exception contains no textual limitation to civil cases. *Id.* at 15a. After a "searching inquiry of the government's evidence and legal theories," the court concluded that the commercial-activity exception applies. *Id.* at 16a; see *id.* at 15a-18a.

Finally, the court of appeals held that "contempt sanctions against a foreign sovereign are available." Supp. App. 18a (quoting *FG Hemisphere Assocs., LLC* v. *Democratic Republic of Congo*, 637 F.3d 373, 379 (D.C. Cir. 2011)). The court accordingly determined that the district court had "'power to impose sanctions'" and noted that "[w]hether and how" that judgment, if unpaid, "can be enforced by execution is a question for a later day." *Ibid.* (citation omitted).[4]

Judge Williams filed an opinion concurring in part and concurring in the judgment. Supp. App. 22a-27a. He joined the court in rejecting petitioner's contention that the FSIA confers blanket immunity on foreign instrumentalities in criminal cases, but would have held that a different clause in the commercial-activity excep-

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[4] The court of appeals also rejected petitioner's contentions that compliance would require it to violate foreign law and would be unreasonable or oppressive under Federal Rule of Criminal Procedure 17(c). Supp. App. 19a-21a. Petitioner does not renew those contentions in this Court.

tion "most compellingly establishes grounds" for concluding "that [petitioner] is not immune to the subpoena" in this case. *Id.* at 22a.

8. Since this Court's denial of petitioner's application for a stay pending the filing of a petition for certiorari, litigation has resumed in the district court. On January 9, 2019, petitioner filed a motion seeking a declaration that the district court's order assessing monetary contempt sanctions was unenforceable under the FSIA and asking the court to stay the accrual of sanctions pending the disposition of the petition for certiorari. D. Ct. Docket entry No. 45.[5] The court denied the request for a stay pending certiorari the next day. D. Ct. Docket entry No. 48 (Jan. 10, 2019). Petitioner then sought a stay of the accrual of contempt sanctions pending the court's disposition of the motion for a declaration on enforceability, which the court denied the same day. D. Ct. Docket entry Nos. 56-57 (Jan. 15, 2019). On January 24, 2019, the court issued a memorandum and order denying petitioner's motion for a declaration that the contempt sanction is unenforceable. D. Ct. Docket entry Nos. 64-65.[6]

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[5] The district court has unsealed a docket sheet, with redactions, available at https://www.dcd.uscourts.gov/sites/dcd/files/FINAL_18gj41_PublicDocket_20190131.pdf (Jan. 31, 2019). The filings, orders, and opinions remain under seal. The petition does not raise issues addressed in those materials. If the Court so requests, the government will lodge those materials with the Clerk.

[6] Additional procedural developments remain under seal. The government has filed a motion for leave to submit a supplemental sealed brief in opposition to apprise the Court of those developments.

ARGUMENT

Petitioner contends (Pet. 15-38) that this Court should grant certiorari to decide (1) whether foreign-state-owned enterprises are categorically immune from all criminal proceedings, including grand jury proceedings; and, (2) if not, whether a district court can impose monetary contempt sanctions on such an enterprise for violation of a court order requiring compliance with a grand jury subpoena. The court of appeals correctly decided both questions, and neither question warrants this Court's review.

1. Petitioner contends (Pet. 17-28) that the FSIA completely bars the exercise of criminal jurisdiction against foreign states, agencies, and instrumentalities. The court of appeals' holding —that, if the FSIA applies to criminal cases and one of its exceptions to immunity is satisfied, a district court may exercise jurisdiction under 18 U.S.C. 3231—is correct and does not conflict with any decision of this Court or any other court of appeals. This case would also be a poor vehicle to address petitioner's claim to absolute immunity under the FSIA.

a. As an initial matter, the court of appeals assumed, without deciding, that the FSIA applies in criminal cases, including grand jury proceedings. In fact, however, this Court's decisions, the text of the FSIA, and its purposes and operation all point to the conclusion that its focus is exclusively civil.

This Court has repeatedly described the FSIA as addressed to civil actions and has never suggested that it applies in the criminal context. See *Verlinden B. V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 488 (1983) (the FSIA provides "a comprehensive set of legal standards governing claims of immunity in every *civil* action

against a foreign state or its political subdivisions, agencies, or instrumentalities") (emphasis added); *Republic of Argentina* v. *NML Capital, Ltd.*, 573 U.S. 134, 141 (2014) (same); *Republic of Austria* v. *Altmann*, 541 U.S. 677, 691 (2004) (same). The only courts that have addressed the question in criminal prosecutions or grand-jury cases have held that the FSIA does not apply. See *United States* v. *Noriega*, 117 F.3d 1206, 1212 (11th Cir. 1997); *In re Grand Jury Proceeding Related To M/V Deltuva*, 752 F. Supp. 2d 173, 176-180 (D.P.R. 2010); *United States* v. *Hendron*, 813 F. Supp. 973, 974-977 (E.D.N.Y. 1993). Those decisions, as the government has argued, are correct.

The FSIA's text, read "as a whole," *Samantar* v. *Yousuf,* 560 U.S. 305, 319 (2010), demonstrates that the Act is exclusively civil in its application. The Act begins by conferring jurisdiction on the district courts over "any nonjury civil action" in which a foreign state is not immune. 28 U.S.C. 1330(a). The Act's procedures for asserting immunity or other jurisdictional limits address only civil actions. See 28 U.S.C 1441(d) (removal of "[a]ny civil action"); 28 U.S.C. 1608(d) (deadline for serving "an answer or other responsive pleading to the complaint"). The Act's other procedural provisions have a uniform focus on civil actions. See, *e.g.*, 28 U.S.C. 1391(f) (venue); 28 U.S.C. 1608(a) and (b) (service rules). And the statutory findings and declaration of purpose refer to the "rights of both foreign states and litigants," without reference to governments or prosecutors that conduct criminal proceedings. 28 U.S.C. 1602. The exclusively civil focus of these provisions "supports the view of * * * the United States that the Act does not address" immunity from criminal prosecu-

tion. *Samantar*, 560 U.S. at 319 (holding FSIA inapplicable to suits against foreign officials in their official capacity).

The FSIA's background, purpose, and legislative history confirm that its immunity provisions were designed to address civil cases. See *Samantar*, 560 U.S. at 316 n.9, 319 n.12, 320-325 (conducting a similar analysis). "[T]he 'Act and its legislative history do not say a single word about possible criminal proceedings." Supp. App. 12a (quoting Joseph W. Dellapenna, *Suing Foreign Governments and Their Corporations* 37 (2d ed. 2003)). "To the contrary, the relevant reports and hearings suggest Congress was focused, laser-like, on the headaches born of private plaintiffs' civil actions against foreign states." *Ibid.*

The Act was passed to address problems that arose exclusively in civil actions—the Executive Branch's having requests for immunity thrust upon it and the resulting political considerations leading to inconsistent immunity determinations and uncertainty for litigants. See 1976 House Report 6-9; *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearing Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary on H.R. 11315*, 94th Cong., 2d Sess. 24-27, 31-35, 60 (1976) (1976 Hearings). The Executive Branch proposed the FSIA to govern "[h]ow, and under what circumstances, * * * private persons [can] maintain a lawsuit against a foreign government or against a commercial enterprise owned by a foreign government." 1976 Hearings 24 (State Department); accord *id.* at 29 (Justice Department). The House Report likewise noted the need for "comprehensive provisions" to "inform parties when they can have recourse to the courts to assert a legal

claim against a foreign state," 1976 House Report 7, and repeatedly referred to "plaintiffs," "suit[s]," "litigants," and "liability," *id.* at 6-8, 12—all terms that suggest civil actions.

As for criminal matters, no text or history suggests that Congress intended the FSIA to displace the federal government's traditional role in deciding whether to prosecute or subpoena a foreign-government-owned business—a step that the government has taken in appropriate cases for decades. See pp. 18-19, *infra*. Nor do the FSIA's purposes support such an extension. The federal government, not a private party, controls whether to initiate a federal criminal matter against a foreign-government-owned commercial enterprise. See *Pasquantino* v. *United States*, 544 U.S. 349, 369 (2005); see also *United States* v. *Sinovel Wind Grp. Co.*, 794 F.3d 787, 792 (7th Cir. 2015). Immunity in criminal matters "simply was not the particular problem to which Congress was responding." *Samantar*, 560 U.S. at 323 (discussing officials).

b. In any event, the court of appeals correctly held that, assuming the FSIA applies, so do its exceptions to immunity, and satisfying one of those exceptions permits a district court to exercise jurisdiction under 18 U.S.C. 3231.

i. The FSIA confers immunity "from the jurisdiction of the courts of the United States and of the States" with delineated exceptions. 28 U.S.C. 1604. Section 1605, in turn, lists the statutory exceptions to immunity, which are categorically applicable "in any case." 28 U.S.C. 1605(a); see Supp. App. 15a. Some of the exceptions focus on civil causes of actions that can result in money damages. *E.g.*, 28 U.S.C. 1605(a)(5). But the commercial-activity exception in Section 1605(a)(2) has

no such textual limitation. Petitioner's only textual argument against criminal jurisdiction is its assertion that the grant of civil jurisdiction under 28 U.S.C. 1330(a) implicitly bars the exercise of criminal jurisdiction under 18 U.S.C. 3231. But as the court of appeals explained, "nothing in the Act's text expressly displaces [S]ection 3231's jurisdictional grant." Supp. App. 7a. Rather, Section 1330(a) "by its terms merely *confers* jurisdiction." *Id.* at 8a.[7]

The FSIA's legislative history confirms that Section 1330(a)'s purpose is to grant jurisdiction in certain civil actions, not to implicitly strip courts of criminal jurisdiction. The House Report explains that Section 1330 is intended to ensure that parties can have their cases heard in federal court, 1976 House Report 13, and that Section 1604 is the "only basis" on which a foreign state may "claim immunity from the jurisdiction" of federal courts, *id.* at 17. The history provides no support for the idea that the grant of jurisdiction in Section 1330 reaches beyond the civil context to affirmatively bar criminal actions.

Petitioner's interpretation would, as the court of appeals recognized, lead to a result that Congress could not have intended—*i.e.*, that "purely commercial enterprise[s] operating within the United States," if majority-owned by a foreign government, could "flagrantly violate criminal laws" and ignore criminal process, no matter

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[7] Petitioner notes (Pet. 24-25) that the exception to immunity for state-sponsored terrorism, 28 U.S.C. 1605A, describes civil actions. That is consistent with the government's view that the FSIA only applies to civil actions. In any event, because that exception was added decades after the FSIA was enacted, it affords no reliable "'basis for inferring the intent of an earlier' Congress." *United States* v. *Texas*, 507 U.S. 529, 535 n.4 (1993) (citation omitted).

how domestic the conduct or egregious the violation. Supp. App. 10a. Banks, airlines, software companies, and similar commercial businesses could wittingly or unwittingly provide a haven for criminal activity and would be shielded against providing evidence even of domestic criminal conduct by U.S. citizens. See *id.* at 10a-11a. Although petitioner declares that result to be "precisely what Congress intended," Pet. 25, it cannot plausibly be maintained that Congress and the Executive Branch—which drafted the FSIA—would have adopted such a rule "without so much as a whisper" to that effect in the Act's extensive legislative history, *Samantar*, 560 U.S. at 319.[8]

ii. Petitioner's primary arguments (Pet. 14, 17, 21-24, 26-28) rest not on statutory text or legislative history but on statements in this Court's decisions describing the FSIA as comprehensive and as the exclusive basis for obtaining jurisdiction over a foreign state. The court of appeals' opinion is fully consistent with the cited decisions, which—as the court below recognized, Supp. App. 8a-13a—addressed specific problems in the context of civil, not criminal, cases.

Petitioner principally relies on *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989), a civil action in which the plaintiff sought to avoid the FSIA's immunity rules by invoking statutory grants of

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[8] Petitioner suggests (Pet. 26) that Congress would not have been troubled by barring federal criminal jurisdiction over foreign state-owned enterprises because the President could use tools such as economic sanctions to address foreign instrumentalities "that commit crimes in the United States." That overlooks not only the legal and practical limits on sanctions, but also the threshold need to acquire evidence through grand jury subpoenas in order to determine whether a crime has been committed—including by U.S. citizens.

jurisdiction over civil cases from outside of the FSIA and claiming that the FSIA's jurisdictional-immunity framework, see 28 U.S.C. 1604-1607, was therefore inapplicable. 488 U.S. at 431-433. The Court held that private plaintiffs cannot avoid the FSIA by invoking bases of jurisdiction from other statutes. *Id.* at 434-439. The Court explained that "[Section] 1604 bars federal and state courts from exercising jurisdiction when a foreign state is entitled to immunity," and jurisdiction accordingly "'depends on the existence of one of the specified exceptions.'" *Id.* at 434-435 (citation and emphasis omitted). Given the "comprehensiveness of the statutory scheme," the Court reasoned that Congress did not need to amend "other grants of subject-matter jurisdiction in Title 28" such as "federal question" jurisdiction. *Id.* at 437; see *id.* at 437-439. The Court thus explained that the FSIA is "the sole basis for obtaining jurisdiction over a foreign state," *id.* at 434, 439, and "turn[ed] to whether any of the exceptions enumerated in the Act apply," *id.* at 439.

Amerada Hess and petitioner's other cited decisions involved civil suits against foreign entities covered by the FSIA, not a criminal matter involving a grand jury subpoena. As the court of appeals recognized, those decisions establish that the FSIA treats civil jurisdiction comprehensively. But nothing in *Amerada Hess*'s language addresses, let alone forecloses, the court of appeals' analysis in this case. See *Illinois* v. *Lidster*, 540 U.S. 419, 424 (2004) ("[G]eneral language in judicial opinions" must be read "as referring in context to circumstances similar to the circumstances then before the Court and not referring to quite different circumstances that the Court was not then considering.").

In any event, the language quoted by petitioner does not support its argument. Petitioner notes (Pet. 7, 13, 21) that *Amerada Hess* described "the FSIA [as] the sole basis for obtaining jurisdiction over a foreign state." 488 U.S. at 434, 439. But even in the context of the civil action in that case, *Amerada Hess* explained only that Section 1604 bars "jurisdiction when a foreign state is entitled to immunity" and that "'subject-matter jurisdiction in any such action depends on the existence of one of the specified exceptions to foreign sovereign immunity.'" *Id.* at 434-435 (quoting *Verlinden*, 461 U.S. at 493) (emphasis omitted). Here, the courts below expressly relied on one of the specified immunity exceptions before upholding jurisdiction. Petitioner similarly quotes *Amerada Hess*'s statement in a footnote that "jurisdiction in actions against foreign states is comprehensively treated by * * * [S]ection 1330." Pet. 8, 17 (quoting *Amerada Hess*, 488 U.S. at 437 n.5); see *id.* at 26 (similar). But that footnote merely quoted from committee reports' explanation for removing the reference to foreign states from 28 U.S.C. 1332, which provides diversity jurisdiction in civil cases. 488 U.S. at 437 n.5 (explaining that diversity jurisdiction became "superfluous" once the new Section 1330 provided jurisdiction for civil actions against foreign states) (citation omitted).[9]

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[9] Petitioner's similar quotations (Pet. 8-9, 17) from cases such as *Verlinden* and *NML Capital* also do not support its position. Like *Amerada Hess*, those cases involved civil suits that did not address jurisdiction over criminal actions. In fact, both cases describe the FSIA as being comprehensive as to "civil action[s]." See pp. 9-10, *supra*.

iii. Petitioner additionally argues (Pet. 5-6, 7, 9-10, 27) that its rule of absolute immunity in criminal matters is compelled by international law. Petitioner's sources at most reflect an international consensus against prosecuting foreign states themselves. See Hazel Fox, *The Law of State Immunity* 89 (3d ed. 2013) (immunity bars applying "criminal law to regulate the public governmental activity of the foreign State"); *id.* at 89 n.64 (states shielded from claims "related to the exercise of governmental powers"). But as the court of appeals recognized (Supp. App. 11a), no such rule extends to state-owned corporations. See William C. Hoffman, *The Separate Entity Rule in International Perspective*, 65 Tul. L. Rev. 535, 565-566 (1991); Andrew Dickinson, *State Immunity and State-Owned Enterprises*, 10 Bus. L. Int'l 97, 125-127 (2009).

Petitioner's citation to the immunity laws of other countries (Pet. 9-10) confirms the point: The cited laws state that they do not apply to criminal cases.[10] In addition, many of those laws make clear that government-owned corporations are generally not treated as the state for purposes of immunity, except where the corporation is engaging in the "exercise of sovereign authority," State Immunity Act 1978, c. 33, § 14(2)(a) (United Kingdom)—in other words, they establish a framework roughly analogous to the court of appeals' application of the commercial-activity exception in this case. See *ibid.*; Foreign States Immunities Act of 1981 §§ 1(2)(i), 15(1)

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[10] Foreign States Immunities Act of 1981 § 2(3) (South Africa); State Immunity Act, R.S.C. 1985, c. S-18, § 18 (Canada); The State Immunity Ordinance No. 6 of 1981 § 17(2)(b) (Pakistan); State Immunity Act, Ch. 313, Pt. 3, § 19(2)(b) (rev. 2014 ed.) (Singapore); State Immunity Act 1978, c. 33, § 16(4) (United Kingdom).

(South Africa); The State Immunity Ordinance No. 6 of 1981 § 15 (Pakistan); State Immunity Act, Ch. 313, Pt. 3, § 16 (rev. 2014 ed.) (Singapore).[11]

iv. Finally, the decision below does not diverge from any "longstanding rule" (Pet. 7) of absolute immunity or signal any sea-change in American practice (see Pet. 2, 4, 7, 28 n.10). To the contrary, petitioner's position would have that effect by casting aside decades of practice under which the United States has prosecuted and served criminal process on commercial enterprises that are majority-owned by foreign governments. See, *e.g.*, *In re Pangang Grp. Co.*, 901 F.3d 1046, 1049 (9th Cir. 2018); *United States* v. *Ho*, No. 16-cr-46, 2016 WL 5875005, at *6 (E.D. Tenn. Oct. 7, 2016); *M/V Deltuva*, 752 F. Supp. 2d at 176-180; *United States* v. *Jasin*, No. 91-cr-602, 1993 WL 259436, at *1 (E.D. Pa. July 7, 1993); *In re Sealed Case*, 825 F.2d 494, 495 (D.C. Cir. 1987) (per curiam); *In re Grand Jury Investigation of Shipping Indus.*, 186 F. Supp. 298, 318-320 (D.D.C. 1960); *In re Investigation of World Arrangements*, 13 F.R.D. 280, 288-291 (D.D.C. 1952); see also, *e.g., United States* v. *Statoil, ASA*, No. 06-cr-960 (S.D.N.Y. Oct. 13, 2006) (criminal information and deferred prosecution agreement against Norwegian state-owned oil company);[12] *United States* v. *Aerlinte Eireann*, No. 89-cr-647,

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[11] Petitioner additionally cites (Pet. 5-6) several cases about immunity for heads of state. The FSIA does not address immunity of foreign officials, however, and petitioner makes no argument about why those cases bear on immunity of state-owned commercial enterprises.

[12] https://www.justice.gov/criminal-fraud/case/united-states-v-statoil-asa-court-docket-number-06-cr-960 (updated June 9, 2015).

Docket entry No. 12 (S.D. Fla. Oct. 6, 1989) (guilty plea of airline then owned by Ireland).[13]

The cases quoted by petitioner as describing immunity rules were all civil actions, and none supports petitioner's claim to absolute immunity. *The Schooner Exchange* v. *McFaddon*, 11 U.S. (7 Cranch) 116 (1812), involved immunity of a sovereign's warship, see *id.* at 135, 137, and pre-dated the rule that foreign sovereign immunity was "the case-by-case prerogative of the Executive Branch." *Republic of Iraq* v. *Beaty*, 556 U.S. 848, 857 (2009); see *Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U.S. 682, 699-703 (1976) (opinion of White, J.) (describing the rule's development). The statement in *Rubin* v. *Islamic Republic of Iran*, 138 S. Ct. 816, 821 (2018), that "foreign states enjoyed absolute immunity from all actions in the United States" (Pet. 4) was preceded and followed by language acknowledging that this was the Executive Branch's "generally held * * * position" until 1952 when determining immunity, after which the Executive's policy changed "as foreign states

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[13] Although the district court in *World Arrangements* ultimately quashed the subpoena and the district court in *Shipping Industry* reserved judgment on the state-owned shipping company's immunity, both cases are examples of the Executive Branch's longstanding position that state-owned enterprises are not immune from criminal process. Contrary to the categorical approach petitioner espouses, the courts did not automatically dismiss the actions on the ground that criminal matters can never proceed against state-owned corporations, as petitioner urges. Rather, they analyzed whether the state-owned entities were organs of the state performing sovereign functions—an analysis that would have been unnecessary if a showing that the companies were majority-owned by a foreign government automatically entitled them to absolute immunity from criminal jurisdiction.

became more involved in commercial activity in the United States." 138 S. Ct. at 821.

c. Petitioner contends (Pet. 16-20, 37) that the courts of appeals are divided over whether American courts can exercise subject-matter jurisdiction over foreign states or instrumentalities in criminal cases. Petitioner does not point to any court that has declined to exercise criminal jurisdiction by dismissing an indictment or quashing a subpoena under the FSIA. Nor does petitioner show that any other court of appeals has addressed the court of appeals' conclusion here that, if the FSIA applies in criminal cases and the commercial-activity exception to immunity is satisfied, then jurisdiction exists under 18 U.S.C. 3231. The decision below therefore does not conflict with the decision of another court of appeals, and the infrequently raised issue here does not otherwise warrant this Court's intervention.

i. Petitioner principally contends (Pet. 16, 19-20, 37) that the court of appeals' decision conflicts with the Sixth Circuit's decision in *Keller* v. *Central Bank of Nigeria*, 277 F.3d 811 (2002). The court of appeals correctly recognized (Supp. App. 13a) that "no conflict" exists. *Keller* was a civil suit against the central bank of Nigeria and several purported bank employees, arising from a fraud perpetrated by a self-identified Nigerian prince. 277 F.3d at 814-815, 818. In reviewing civil allegations of violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1964(c), the court considered whether the alleged "act[s]"—the asserted fraud—were "indictable," an element of civil-RICO claims. *Keller*, 277 F.3d at 818 (citing 18 U.S.C. 1961(1)(B), 1962(b)-(d)). The court stated that the FSIA's jurisdictional-immunity provision, 28 U.S.C. 1604, applies to criminal cases, and therefore "jurisdiction over

a foreign sovereign will exist only if there is a relevant international agreement or an exception listed in 28 U.S.C. §§ 1605-1607." *Keller*, 277 F.3d at 819-820. The court then said that there was no applicable "international agreement" and that "the FSIA does not provide an exception for criminal jurisdiction." *Id.* at 820. The court accordingly concluded that, because the defendants could not be indicted, the civil-RICO suit failed to state a claim. *Id.* at 820-821.

Keller should not be read to mean, as petitioner contends (Pet. 19), that, as a categorical matter, "the FSIA forecloses criminal jurisdiction." Rather, *Keller* contemplated that jurisdiction could exist in criminal cases by repeatedly suggesting that a criminal prosecution could proceed if authorized by an "international agreement," 277 F.3d at 820—a position that is inconsistent with petitioner's argument here. While *Keller* also quoted with approval broad language from a district court decision that found a civil-RICO action barred by the FSIA on the ground that criminal jurisdiction was unavailable, see *id.* at 819-820, *Keller*'s conclusion that the FSIA would not bar jurisdiction if there were an "international agreement stating otherwise," *id.* at 820, shows that *Keller* did not fully embrace that broad language. And, as the court below recognized, the Sixth Circuit has not confronted a case in which the government brought criminal proceedings and based jurisdiction on 18 U.S.C. 3231, and it therefore "has yet to squarely address whether that provision can support jurisdiction consistent with the Act." Supp. App. 13a. If "confronted with the same issue" faced here, "the Sixth Circuit would be free to reach the same conclusion" as the court below—"that section 3231 can be invoked in conjunction with the [FSIA]." *Ibid.*

ii. Petitioner additionally contends (Pet. 16, 18-19) that the decision below conflicts with decisions of seven other courts of appeals. But the cases cited by petitioner were all civil actions and did not address any question passed upon by the court of appeals here. Several of those cases merely described the FSIA using terms such as "comprehensive," "exclusive," or "sole"; they confirm that where the FSIA's immunity framework applies, jurisdiction depends on whether an exception to immunity applies. *Shapiro* v. *Republic of Bolivia*, 930 F.2d 1013, 1017-1020 (2d Cir. 1991); *Janvey* v. *Libyan Inv. Auth.*, 840 F.3d 248, 257, 259-263 (5th Cir. 2016) (per curiam); *Wolf* v. *Federal Republic of Germany*, 95 F.3d 536, 540-544 (7th Cir. 1996), cert. denied, 520 U.S. 1106 (1997); *Community Fin. Grp., Inc.* v. *Republic of Kenya*, 663 F.3d 977, 979, 980-982 (8th Cir. 2011); *McKeel* v. *Islamic Republic of Iran*, 722 F.2d 582, 585-589 (9th Cir. 1983), cert. denied, 469 U.S. 880 (1984). Several of the cited cases also stand for the proposition that in a civil action against a foreign sovereign, the FSIA's specific grant of subject-matter jurisdiction and procedures for civil actions against foreign states, such as a non-jury trial, must apply. *Mobil Cerro Negro, Ltd.* v. *Bolivarian Republic of Venezuela*, 863 F.3d 96, 112-125 (2d Cir. 2017); *Ruggiero* v. *Compania Peruana de Vapores "Inca Capac Yupanqui,"* 639 F.2d 872, 873-878 (2d Cir. 1981); *Rex* v. *Cia. Pervana de Vapores, S. A.*, 660 F.2d 61, 62-65 (3d Cir. 1981), cert. denied, 456 U.S. 926 (1982); *Williams* v. *Shipping Corp. of India*, 653 F.2d 875, 876-881 (4th Cir. 1981), cert. denied, 455 U.S. 982 (1982); *Goar* v. *Compania Peruana de Vapores*, 688 F.2d 417, 418, 420-422 (5th Cir.

1982). But none of those cases addressed whether or how the FSIA applies to a criminal case.[14]

iii. Even if there were genuine tension between the decision below and the cases cited by petitioner, it would not warrant further review. Petitioner argues that jurisdiction can never exist over foreign-state-owned businesses in criminal matters. But no court has declined to exercise jurisdiction in a criminal prosecution or grand jury proceeding on that basis. See Restatement (Fourth) of Foreign Relations Law of the United States § 451 reporter's note 4 (2018). And even in the circuit that decided the case (*Keller*) principally relied on by petitioner (Pet. 19-20, 37), the United States has not understood government-owned businesses to be immune from criminal prosecution and process. See, *e.g.*, *Ho*, 2016 WL 5875005, at *6 (noting prosecution of Chinese-government-owned power company in the Sixth Circuit).

There is no pressing need for this Court to intervene in the absence of a conflict. The issue raised by petitioner has arisen infrequently since the FSIA's enactment in 1976. The number of cases in which the issue could arise is further reduced by this Court's 2010 decision in *Samantar*, *supra*, that the FSIA does not apply in suits against individuals acting in their official capacity. And contrary to petitioner's contention (Pet. 2-3, 20, 36-38), the decision below breaks no new ground in

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[14] Petitioner additionally notes (Pet. 20) that two courts of appeals have held that the FSIA does not govern criminal proceedings. *Noriega*, 117 F.3d at 1212; see *Southway* v. *Central Bank of Nigeria*, 198 F.3d 1210, 1214-1215 (10th Cir. 1999) (civil RICO case). But the court below expressly declined to address that question. Supp. App. 5a-6a.

the United States' exercise of criminal jurisdiction. See pp. 18-19, *supra*.

This case would also be a poor vehicle to address the question that petitioner seeks to present. Before addressing how the FSIA's provisions apply to criminal cases, this Court's ordinary practice would require it to consider "the antecedent question" whether the FSIA applies to criminal cases at all. *United States* v. *Grubbs*, 547 U.S. 90, 94 & n.1 (2006). But that question was not passed upon by the courts below. Because this Court is a court of "review, not of first view," *McWilliams* v. *Dunn*, 137 S. Ct. 1790, 1801 (2017) (citation omitted), this case would be an inappropriate vehicle to consider that issue.

2. Petitioner also contends (Pet. 28-35) that the FSIA bars the imposition of contempt sanctions in this case. The court of appeals correctly held that the district court could impose monetary contempt sanctions to require petitioner to comply with a grand jury subpoena. Petitioner identifies no court of appeals that would have prohibited imposition of monetary contempt sanctions in these circumstances. Although a narrow conflict exists about the authority to impose contempt sanctions in civil suits against foreign states, the contempt order in this case does not implicate that conflict, and this case therefore presents no occasion for resolving it.

a. The district court's imposition of monetary contempt sanctions in this case was consistent with the FSIA. The Act confers two kinds of immunity: immunity from jurisdiction, 28 U.S.C. 1604-1607, and immunity from attachment and execution of judgment, 28 U.S.C. 1609-1611. Petitioner argues (Pet. 29-32) that the FSIA would not permit *execution* of a monetary contempt

judgment, *i.e.*, enforcement if the contemnor refused to pay. But petitioner does not explain why, even if that were so, that asserted barrier to executing on an unpaid judgment would categorically prohibit a district court from imposing a contempt sanction in the first place for non-compliance with a grand jury subpoena. And the court of appeals explicitly declined to reach whether execution would be permitted, Supp. App. 18a, making it inappropriate for this Court to address that issue in the first instance. Petitioner's only argument about entry, rather than enforcement, of contempt sanctions is its quotation (Pet. 31) from congressional testimony by the State Department Legal Adviser in 1987, which does not address the relevant issue and could not create an immunity that the text itself does not.[15]

b. In any event, petitioner's arguments (Pet. 29-33) against enforceability of contempt sanctions are misguided. The provisions governing execution of judgment are part of the Act's "comprehensive set of legal standards governing claims of immunity in every *civil action*," *NML Capital*, 573 U.S. at 141 (emphasis added); see *id.* at 142; 1976 Hearings 26 (describing those provisions as "provid[ing] U.S. citizens with the remedy of execution"); 1976 House Report 12. No text

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[15] The Legal Adviser stated that "[t]he legislative history of the Act properly suggests, we believe, that imposition of a fine on a foreign state or incarceration of its officials for a state's failure to comply with a court order would not be permitted." *Hearing Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary on H.R. 1149, H.R. 1689, and H.R. 1888*, 100th Cong., 1st Sess. 19 (1987). That testimony occurred 11 years after the FSIA was passed and, as reflected in its reference to "officials," *ibid.*, the word "state" appears to have concerned states themselves rather than state-owned enterprises. See *id.* at 36 (accompanying prepared statement).

or legislative history indicates that the immunity from execution concerned judgments in criminal cases. See Supp. App. 9a-11a.

Furthermore, assuming the FSIA applies, its exceptions to immunity from execution of judgment would apply as well. The FSIA provides broader exceptions for agencies and instrumentalities than for foreign states. 28 U.S.C. 1609-1611. For agencies and instrumentalities (but not states) that are "engaged in commercial activity in the United States," their property in the United States is not immune from execution if "the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of" the commercial-activity exception, "regardless of whether the property is or was involved in the act upon which the claim is based." 28 U.S.C. 1610(b)(2).

If the FSIA applies and the court enters a fixed, monetary judgment, the exception in Section 1610(b)(2) would be satisfied: Petitioner is engaged in commercial activity in the United States, has property in the United States, and the monetary judgment would "relate[] to a claim for which [petitioner] is not immune by virtue of" the commercial-activity exception, 28 U.S.C. 1610(b)(2). As petitioner acknowledges (Pet. 30), the term "claim" includes not just a "demand for money," but also a demand for "property" and "*a legal remedy to which one asserts a right*; esp., the part of a complaint in a civil action specifying what relief the plaintiff asks for." *Black's Law Dictionary* 301 (10th ed. 2014) (def. 3) (emphasis added). The subpoena issued by the grand jury required the production of documents, and the government's request for enforcement of the subpoena sought to compel production of the evidence to which the grand jury was entitled, backed by sanctions if petitioner did

not produce it. That request constituted a "claim" within the meaning of the FSIA, and the district court's contempt order clearly "relates" to that claim, 28 U.S.C. 1610(b)(2).[16]

c. Petitioner can derive no support from amicus briefs filed by the government in *civil* suits against foreign *states* where the government opposed imposition of contempt sanctions for failure to comply with a discovery or injunctive order in part because the sanctions would be unenforceable under the FSIA. Pet. 33-34.[17] Quite apart from the fact that the government's position here is that the FSIA does not apply to this proceeding at all, the cited amicus briefs involved 28 U.S.C. 1610(a)(2), which permits execution against a foreign *state*'s property only when the property is in the United States and "is or was used for the commercial activity upon which the claim is based"—a considerably narrower test. Furthermore, unlike in the amicus briefs cited by petitioner, where the government relied on

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[16] Petitioner's contrary position is not supported by the government's brief in *FG Hemisphere Assocs., LLC* v. *Democratic Republic of Congo*, 637 F.3d 373 (D.C. Cir. 2011). See U.S. Amicus Br. at 7-8, *FG Hemisphere, supra* (No. 10-7046) (Oct. 7, 2010) (U.S. *FG Hemisphere* Br.). As the quoted language makes clear, that brief did not construe the word "claim" in isolation and, as discussed below, it addressed the narrower exception in Section 1610(a)(2), rather than Section 1610(b)(2), which is at issue here.

[17] See, *e.g.*, U.S. *FG Hemisphere* Br. at 6. In *SerVaas Inc.* v. *Republic of Iraq*, sanctions were entered against both Iraq and the Ministry of Industry, but the court of appeals had previously held that the Ministry was part of the foreign state itself, not an agency or instrumentality. See 653 Fed. Appx. 22, 24-25 (2d Cir. 2011). The United States' discussion of immunity its brief in that case accordingly addressed only sanctions against the foreign state itself. See U.S. Amicus Br. at 18, *SerVaas*, *supra* (No. 14-385) (Sept. 9, 2014).

principles of equity and comity to argue against the imposition of unenforceable contempt sanctions in civil litigation brought by a private party against a foreign state, see *e.g.*, U.S. *FG Hemisphere* Br. at 15-16, here, the government is a party to this case and itself sought the contempt sanction in a criminal proceeding against a state-owned commercial enterprise. The equities here are thus fundamentally different.

d. No circuit conflict exists on the propriety of imposing contempt sanctions against a commercial instrumentality for refusing to comply with a grand jury subpoena. Indeed, no other court of appeals has addressed the question, particularly in circumstances where the FSIA's commercial-activity exception is satisfied.

Petitioner correctly notes (Pet. 28-29) that a narrow circuit conflict exists about imposition of contempt sanctions in civil actions against foreign states. Compare *FG Hemisphere Assocs., LLC* v. *Democratic Republic of Congo*, 637 F.3d 373, 378-379 (D.C. Cir. 2011), and *Autotech Techs. LP* v. *Integral Research & Dev. Corp.*, 499 F.3d 737, 744 (7th Cir. 2007), cert. denied, 552 U.S. 1231 (2008), with *Af-Cap, Inc.* v. *Republic of Congo*, 462 F.3d 417, 428 (5th Cir. 2006), cert. dismissed, 549 U.S. 1275 (2007). While the court of appeals below followed its prior precedent authorizing contempt sanctions, see Supp. App. 18a, the contempt order in this case does not implicate that conflict for several reasons.

First, in the government's view, the FSIA does not apply to execution of judgment in criminal matters. None of the other conflicting decisions faced that issue, and it was not decided below. Second, if the FSIA were held to apply in criminal matters, Section 1610(b)(2), which applies to agencies and instrumentalities and was not at issue in the conflicting decisions of other courts,

would apply here. The Court's resolution of whether Section 1610(b)(2) applies (and permits enforcement) would not necessarily govern cases involving a foreign state, to which the narrower framework of Section 1610(a)(2) would apply. Finally, this case, unlike the others cited, involves the government itself seeking contempt sanctions. The considerations unique to this context have not been addressed by any court of appeals. In view of the significant factual and legal distinctions between this case and the other cited cases, review to resolve a conflict presented in other contexts is not warranted here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

FEBRUARY 2019

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AGUDAS CHASIDEI CHABAD OF UNITED STATES, *Plaintiff*, v. RUSSIAN FEDERATION; RUSSIAN MINISTRY OF CULTURE AND MASS COMMUNICATION; RUSSIAN STATE LIBRARY; and RUSSIAN STATE MILITARY ARCHIVE, *Defendants.*	Case No. 1:05-cv-01548-RCL

[PROPOSED] ORDER

Before the Court Plaintiff Agudas Chasidei Chabad of the United States Motion for an Order to Show Cause directed to the Government of the United States of America.

The Motion is **GRANTED**.

The Court **ORDERS** Government to show cause, within thirty (30) days as to why it has not proffered any response to the Court's instruction regarding the Government's previously filed Statement of Interest.

SO ORDERED this _____ day of _____, 2019.

_____
The Honorable Royce C. Lamberth
United States District Court